UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	)	
	)	**CIVIL ACTION**
Plaintiff,	)	
	)	**CASE NO. 13-cv-00234**
UNITED STATES FISH AND WILDLIFE SERVICE, et al.	)	**c/w 13-362 & 13-413**
	)	
	)	**JUDGE MARTIN L.C. FELDMAN**
Defendants.	)	**SECTION "F"**
	)	
	)	**MAG. SALLY SHUSHAN**
	)	**DIVISION (1)**

POITEVENT LANDOWNERS' MEMORANDUM IN OPPOSITION TO FEDERAL DEFENDANTS' AND INTERVENOR-DEFENDANTS' CROSS-MOTIONS FOR SUMMARY JUDGMENT AND REPLY TO FEDERAL DEFENDANTS' AND INTERVENOR-DEFENDANTS' OPPOSITIONS TO POITEVENT LANDOWNERS' SUMMARY JUDGMENT MOTION

P&F Lumber Company (2000), L.L.C., St. Tammany Land Co, L.L.C. and PF Monroe Properties, L.L.C. (collectively, the "Poitevent Landowners"), through undersigned counsel, respectfully submit the attached memorandum in opposition to Federal Defendants' and Intervenor-Defendants' motions for summary judgment and reply to their replies to the Poitevent Landowners' Motion for Summary Judgment.[1]

INTRODUCTION

> The FWS may not statutorily cast a net over tracts of land with the mere hope that they will develop [the physical and biological elements species require to survive] and be subject to designation. *Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp.2d 108, 122 (D. D.C. 2004).

This case is unprecedented under the ESA. FWS has **never before** attempted to grab

[1] All capitalized terms not otherwise defined in this Memorandum in Opposition and Reply are defined as set forth in the Poitevent Landowners' Memorandum in Support of their Motion for Summary Judgment, which are incorporated herein as if set forth in this Memorandum in their entirety. *See* Poitevent Landowners' Memorandum in Support of their Motion for Summary Judgment [R. Doc. No. 80-1].

private land such as the 1,544 acres in Unit 1 and make it critical habitat for a species knowing that the land is clearly unsuitable for the species; that the species is gone from the land; and that the habitat will never be restored nor the frog be returned to the land, merely to satisfy the its "wish list", which came here in the form of a dreamy "hope" the FWS has to convert the Poitevent Lands into a frog refuge and then move frogs there. As FWS so tellingly puts it in the Rule:

> Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we **hope** to work with the [Poitevent Landowners] to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there… 77 Fed. Reg. 35123. (Emphasis added.)

Even the CBD admits that the FWS' action in designating Unit 1 as frog habitat under these circumstances was "unusual".[2]

Prior to issuing the Rule, FWS was notified by the Poitevent Landowners that, if the Rule was enacted, the land comprising Unit 1 would remain in commerce, i.e., an industrial forest (tree farm) and agricultural pursuit, which means that FWS' "hope" cannot become reality. So what did FWS then do? It simply "threw a statutory net" over the Poitevent Lands and issued the Rule for lands the FWS and CBD admit are utterly unsuitable for frogs and are not currently their habitat, surely knowing that this action would then make the lands unusable and unsellable.[3] This arbitrary action by FWS thus renders FWS' vain "hope" hopeless. FWS cannot kiss a non-existent frog and have its "wish list" magically granted.

---

[2] CBD's Memorandum in Support of Cross-Motion for Summary Judgment [R. Doc. No. 95-1] at p. 19.

[3] The whole point of habitat designation under the ESA is to take land out of commerce and reserve it for a species, not people. Otherwise, establishing a protected preserve for the species would be meaningless. FWS has the power in the ESA to prohibit any development activity a landowner may wish to pursue once critical habitat is established for a species if FWS deems that the development activity may harm the species. *See* 16 U.S.C. § 1540(g). This may include "habitat modification or degradation." 50 C.F.R. § 17.3. This power can also be enforced against a landowner by development opponents in a citizen suit under ESA. 16 USC § 1540(g).

If the Court allows the Rule to stand for the Poitevent Lands under these circumstances, no land anywhere in the United States will be safe from the FWS' long-US taxpayer-financed arm. There will then be no limits on the amount or location of private land that it can set aside as "critical habitat" based on its speculative "hope" that the land might someday, somehow become real habitat for some species. Private property rights will be seriously eroded.

History and long experience have shown the impact of what happens when frogs are inflicted upon people unwillingly, beginning with Moses' plague of frogs on the Egyptians:

> This is what the great LORD says: Let my people go, so that they may worship me. If you refuse to let them go, I will plague your whole country with frogs. The Nile will teem with frogs. They will come up into your palace and your bedroom and onto your bed, into the houses of your officials and on your people, and into your ovens and kneading troughs. The frogs will go up on you and your people and all your officials. Exodus :1-4.

For the reasons discussed herein and in the Poitevent Memorandum, as well as those articulated in the motions for summary judgment filed by Markle and Weyerhaeuser, this Court should free the Poitevent Lands from the burdens of the Rule so that a plague of frogs does not "come up" on them.

STATEMENT OF FACTS

While a full statement of the facts is set forth in the Poitevent Landowners' Memorandum and is unnecessary here, the following portion of the facts bears repeating for purposes of this Memorandum as it goes to an important point for the Poitevent Landowners' legal argument below, and yet has been conveniently ignored by FWS and CBD in their respective Memoranda:

1. After the CBD and the Friends of Mississippi Public Lands sued FWS to require it to designate critical habitat for the dusky gopher frog, see *Friends of Mississippi Public Lands and Center for Biological Diversity* v. *Kempthorne.* AR 2421-2433; 77 Fed. Reg. 35119, FWS settled with CBD and agreed to submit to the *Federal Register* a proposed designation of frog critical habitat by May 30, 2010, and a final designation of frog critical habitat by May 30, 2011. FWS published a proposed rule to designate critical habitat for the frog on June 5, 2010. *See* 75 Fed.

Reg. 31387. The proposed rule did **not** contain Unit 1.[4]

2. What happened next is alarming: FWS admits that its agents, along with one of their "peer reviewers," Prof. Joseph Pechmann targeted the Poitevent Lands **after** the original settlement was signed in the CBD-FWS suit that then ended up including the Poitevent Lands under the Rule. FWS bureaucrats and Prof. Pechmann then remained in contact and together **trespassed** on the Poitevent Lands in March 2011. See, Poitevent Landowners' Statement of Uncontested Material Facts and Poitevent Decl., Ex. "B.".

3. **After** this trespass occurred, FWS and the CBD then duly agreed to extend the deadline established by their original settlement. The Court issued a modification to the original settlement on May 4, 2011, and FWS agreed to send a revised proposed critical habitat rule for the frog to the *Federal Register* by September 15, 2011, and a final critical habitat rule to the Federal Register by May 30, 2012.

4. FWS then published a revised proposed critical habitat rule in the Federal Register on September 27, 2011 (76 Fed. Reg. 59774) and **replaced** FWS' June 3, 2010 (75 Fed. Reg. 31387), proposed critical habitat rule in its entirety. The September 27, 2011 proposed rule, then included Unit 1 as proposed critical habitat for the frog as they had been advised by Professor Pechmann and FWS issued the Rule.

See, Poitevent Landowners' Statement of Material Facts [R. Doc. No. 80-4] at ¶¶ 8-20.

ARGUMENTS

A. The Poitevent Landowners Have Article III Standing

FWS' assertion that Poitevent Landowners lack Article III standing because they have suffered no injury is meritless. The U.S. Supreme Court has held that when the plaintiff is directly regulated "there is ordinarily little question that the action . . . has caused him injury." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). "Similarly, the D.C. Circuit has suggested that standing is usually self-evident when the plaintiff is a regulated party or an organization representing regulated parties." *Am. Petroleum Inst.*, 541 F. Supp. 2d at 176. As a

[4] The Poitevent Landowners were never informed about the CBD-FWS suit or their settlement and were completely left out of any negotiations to include their lands in the proposed Rule. The first time they learned that their lands were the subject of the proposed Rule was in a telephone call from FWS agents Linda LaClaire and Carey Norquist on May 21, 2011. Prior to this call, FWS agents and Prof. Pechmann had entered the Poitevent Lands in an illegal trespass that was conducted without the Poitevent Landowners' prior knowledge or approval. *See* Poitevent Decl., Ex. "B," to Poitevent Landowners' Motion for Summary Judgment at ¶ 5. The record also reflects apparent trespass(es) by Prof. Pechmann several years before the proposed Rule was issued. *See*, pp. 12-15 below.

landowner of Unit 1, the Poitevent Landowners are "a regulated party" under the final rule. Their standing is thus self-evident. Moreover, FWS has failed to cite a single case where a landowner was denied standing in a suit challenging the designation of his property as critical habitat, and FWS has concluded that "due to the importance of the unit" to the species the Service may preclude any development of the site at a cost to the landowners of up to $33.9 million. 77 Fed. Reg. 35141. Therefore, the Poitevent Landowners have Article III standing.[5]

B. The Poitevent Landowners Have NEPA Prudential Standing

FWS and Intervenors' argument that the Poitevent Landowners lack NEPA standing, because they have economic interests in this case is contrary to controlling Supreme Court authority. *See Monsanto Co.*, 130 S. Ct. at 2756 ("The mere fact that respondents also seek to avoid certain economic harms . . . does not strip them of prudential standing."). Therefore, the Poitevent Landowners have standing to bring their NEPA challenge.[6]

C. Designating Areas as Critical Habitat That Provide No Benefit to the Species Is an Abuse of Discretion

FWS understands that the Secretary does not have unfettered discretion to designate critical habitat. The Service's own regulations state that an area should not be designated if "[s]uch designation of critical habitat would not be beneficial to the species." 50 C.F.R. § 424.12. To do so is futile, wasteful, and absurd.

It is axiomatic that to benefit the species the area must be both accessible and suitable as habitat. Unit 1 is neither. The gopher frog does not inhabit Unit 1 (and has not for almost 50 years) nor does it occupy any adjacent area. 77 Fed. Reg. 35118-01, 2012 WL 2090270,* 27. It

[5] To avoid unnecessary duplication on this point, the Poitevent Landowners adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at p. 12 and [R. Doc. No. 67-1] at p. 6, respectively.

[6] To avoid unnecessary duplication on this point, the Poitevent Landowners adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at p. 13, 20 and [R. Doc. No. 67-1] at p. 22, respectively.

therefore has no natural access to Unit 1. The frog cannot be transplanted to Unit 1 because the Poitevent Landowners, Markle and Weyerhaeuser will not allow it and (as FWS admits) they cannot be compelled to do so. Thus, Unit 1 is inaccessible to the species. Moreover, Unit 1 cannot support the frog without extensive restoration which the Poitevent Landowners will not allow and which (the Service admits) cannot be compelled.[7] Therefore, as Unit 1 is both inaccessible and unsuitable as habitat, as is, it cannot provide a benefit to the species. and therefore designating it as critical habitat was an abuse of discretion.

D. Unit 1 Does Not Contain the PCE's Necessary for Critical Habitat

FWS' claim that Unit 1 need not contain the very features that it found "essential to the conservation of the species", is preposterous.[8] The status of land as unoccupied does not change the physical or biological requirements of the species:

> Dusky gopher frogs *require* small, isolated, ephemeral, acidic, depressional standing bodies of freshwater for breeding [PCE 1]; upland pine forested habitat that has an open canopy maintained by fire (preferably) for nonbreeding habitat [PCE 2]; and upland connectivity habitat areas that allow for movement between nonbreeding and breeding sites [PCE 3].

77 Fed. Reg. 35132 (emphasis added).

Thus, the Service's argument that Unit 1 may be designated as critical habitat in the absence of any or all of the PCEs is meritless.

E. If the Secretary Does Not Know What "Essential" Means, She Cannot Determine "Essential" Habitat

Although the ESA requires the Secretary to designate as critical habitat only those areas "essential" to the conservation of the species, FWS claims that it need not define the term

[7] See 77 Fed. Reg. 35135 ("Although the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort.").

[8] To avoid unnecessary duplication on this point, the Poitevent Landowners adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at pp. 24-26 and [R. Doc. No. 67-1] at pp. 4-6, respectively.

"essential" so long as it explains the factors the Secretary considered in designating critical habitat. *See* Defendants' cross-motion at 9. But, if the Secretary has no express standard against which to measure, or even select, the factors she considers, the Secretary will have unfettered authority to designate any unoccupied areas as critical habitat. The ESA does not allow a land grab which is unsupported and not measured against any standard:

> [T]he ESA provides for the designation of critical habitat outside the geographic area currently occupied by the species when "such areas are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Absent this procedure, however, there is no evidence that Congress intended to allow the Fish and Wildlife Service to regulate any parcel of land that is merely capable of supporting a protected species.

Ariz. Cattle Growers' Ass'n, 273 F.3d at 1244. Of course, without a definition of "essential," the Secretary cannot perform "this procedure" of designating areas that are "essential" for the conservation of the species and is left to simply "regulate any parcel of land that is merely capable of supporting a protected species." Or, as in this case, even those areas incapable of supporting a protected species.

There is no evidence that Congress intended such a broad exercise of federal power. To the contrary, Congress sought to avoid speculation of any kind in the administration of the ESA. See, *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997), in which the Supreme Court said that "the ESA [can]not be implemented haphazardly, on the basis of speculation or surmise…[T]he primary [objective] is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives."

In the absence of physical and biological features necessary to support a frog population, the designation of Unit 1 as critical habitat is based on speculation and and is, therefore, invalid.[9]

[9] To avoid unnecessary duplication on this point, the Poitevent Landowners also adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their

F. The Secretary's Failure to Determine a Habitat Threshold Is Fatal to the Final Designation

FWS cannot show that any part of the ESA precludes its determining a minimum habitat size for the gopher frog. And, while making such a determination and developing a recovery plan are two different things, it is certain that FWS designated Unit 1 because of its recovery potential: See, 77 Fed. Reg. 35123.

FWS cannot now claim that recovery is irrelevant to the critical habitat designation here, and that recovery goals come into play only after it has developed a recovery plan. To conclude that Unit 1 is "important" to the recovery of the gopher frog, FWS must undertake a recovery analysis that addresses the threshold question of how much habitat is required for species conservation (*i.e.*, for recovery). The ESA defines the term "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 USC § 1532(3). By definition, and logic, then, if FWS cannot determine a viable habitat threshold (*i.e.*, the point at which the protective measures of the ESA are no longer necessary), it simply cannot determine critical habitat. And the FWS did not do this here.[10]

G. The Baseline Approach to the Economic Analysis Understates the Impacts of the Critical Habitat Designation

The Federal Defendants essentially admit that the "baseline" approach would have been inadequate to capture the full economic impact of the critical habitat designation in this case. Def's Cross-Motion, p. 17. Defendants claim that FWS conducted its favored "baseline" approach, but then abandoned it and "attributed all potential impacts in Unit 1 to the

---

own. *See*, [R. Doc. No. 69-1] at pp. 16-17 and [R. Doc. No. 67-1] at pp. 14-17, respectively.

[10] To avoid unnecessary duplication on this point, the Poitevent Landowners also adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at pp. 16-17 and [R. Doc. No. 67-1] at pp. 17-18, respectively.

designation." *Id*. Apparently FWS realized, as Plaintiffs have argued, that the "baseline" approach is flawed in this case where the impacts of the listing itself are uncertain because the species has long been absent from Unit 1, has no ability to return on its own, and there is nothing the Poitevent Landowners can do to affect it. Incidentally, this is the same reason this critical habitat designation in Unit 1 was flawed to begin with.[11]

Although FWS apparently caught the problem and then abandoned the baseline approach in this case, it only highlights the tendency of this approach to underestimate the impacts of designation. As the 10th Circuit explained in *New Mexico Cattle Growers Ass'n v. U.S. Fish & Wildlife Serv.*, 248 F.3d 1277 (10th Cir. 2001), the baseline approach renders the economic analysis "virtually meaningless" because it generally assumes the impacts above the "baseline" of listing and take protection (i.e., those attributable solely to the critical habitat designation) are insignificant.

The Poitevent Landowners urge this Court to "abandon" the baseline approach permanently by adopting the more thorough, transparent coextensive approach required by the 10th Circuit. The fact that the Economic Analysis in this case shows significant incremental impacts, above the baseline, because Unit 1 is unoccupied and there are no co-extensive listing impacts, does not change the fact that the Service applied an erroneous methodology that should be overturned.

H. The Failure of the Secretary To Exclude Unit 1 from Critical Habitat Was an Abuse of Discretion

FWS and Intervenors assert that the inclusion of Unit 1 as critical habitat is unreviewable under

[11] To avoid unnecessary duplication on this point, the Poitevent Landowners adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at pp. 21-23 and [R. Doc. No. 67-1] at pp. 18-20, respectively.

the APA, because that decision is "committed to agency discretion by law."[12] That is incorrect and contrary to the Fifth Circuit's holding in *Suntex Dairy v. Block*, 666 F.2d 158, 163 (5th Cir. 1982), in which the Court stated that the "committed to agency discretion" exception, 5 U.S.C. s 701(a), of the APA is "very narrow"… Access to judicial review should be restricted "(o)nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent" to do so." (U.S. Supreme Court citations omitted.)

Here, no rational decision maker would conclude that the benefits of including a parcel of land as critical habitat, that is inaccessible and unsuitable as habitat, somehow outweighs the potentially overwhelming cost to the landowners of $33.9 million. Unit 1 actually provides no benefit to the gopher frog. Thus, the inclusion of Unit 1 in the critical habitat designation was, by any measure, irrational and, therefore, an abuse of discretion.

I. NEPA Applies To This Case Because the Management of Unit 1 Calls for a Significant Physical Change to the Environment

FWS appears to concede that NEPA review would be appropriate in a critical habitat case if the designation resulted in physical changes to the environment.[13] *See* Defendant's cross-motion at 24-25. Since Unit 1 must be altered given its present use as a tree farm (agriculture), this is such a case.

J. FWS' Regulation of Unit 1 Exceeds the Commerce Power

Both FWS and Intervenors fail to address the Poitevent Landowners' actual constitutional claim or to even mention the controlling authority cited by them. They appear therefore to have conceded the claim. The Poitevent Landowners' claim is simple; the designation of Unit 1, an

[12] To avoid unnecessary duplication, the Poitevent Landowners adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at pp. 24-26 and [R. Doc. No. 67-1] at pp. 8-10, respectively.

[13] To avoid unnecessary duplication, the Poitevent Landowners adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at p. 13, 20 and [R. Doc. No. 67-1] at p. 22, respectively.

unoccupied area of private property, as critical habitat, is not the regulation of commercial activity, or any activity at all. Therefore, the designation of Unit 1 as critical habitat is not an act within the commerce power and is invalid.[14]

Unit 1 is unoccupied and no existing activity on Unit 1 can or does affect the gopher frog, or any other protected species. Accordingly, regulation of Unit 1 under the Rule as critical habitat is invalid under the commerce power.

K. FWS' Trespass Invalidates the Rule

One of the more troubling aspects of this case is the trespass that occurred by FWS and Professor Pechmann of the Poitevent Lands in March 2011 that then resulted in the Poitevent Lands being included in the Rule. *See*, Poitevent Landowners' Statement of Uncontested Material Facts and Poitevent Decl., Ex. "B;" *see also*, Poitevent Landowners' Statement of Uncontested Material Facts, pars. 10-16 and in particular Pars 14-16, which note the details of the trespass and its inexorably inevitable consequence the inclusion in the September 27, 2011 Proposed Rule including Unit 1 in St. Tammany Parish, Louisiana as proposed critical habitat for the frog for the first time (77 Fed. Reg. 35118, et seq).,which then became the Final Rule.

Under Louisiana law, "trespass" is the unlawful physical invasion of the property of another. *Turner v. Murphy Oil USA, Inc*., 234 F.R.D. 597 (E.D. La. 2006). DOJ and CBD admit that they visited the Poitevent Lands in March 2011. *See* Exhibits 1 to both the FWS' and CBD's Motions for Summary Judgment, **which depict the trespass.** They also admit that the Poitevent Lands are owned by the Poitevent Landowners and leased by Weyerhaeuser. *See*, DOJ's Response to Poitevent Landowners' Statement of Uncontested Material Facts [R. Doc. No. 90-2]

[14] To avoid unnecessary duplication on this point, the Poitevent Landowners adopt and incorporate herein by reference the reasons set forth by Markle and Weyerhaeuser in their respective memoranda on this subject as their own. *See*, [R. Doc. No. 69-1] at p. 27-29 and [R. Doc. No. 67-1] at p. 20-21, respectively.

at No. 3 and CBD's Response to Poitevent Landowners' Statement of Uncontested Material Facts [R. Doc. No. 95-2] at No. 3. And, they do not deny that neither FWS nor Professor Pechmann had any authority from the Poitevent Landowners for their March 2011 site visit. *See*, DOJ's Response to Poitevent Landowners' Statement of Uncontested Material Facts [R. Doc. No. 90-2] at No. 15 and CBD's Response to Poitevent Landowners' Statement of Uncontested Material Facts [R. Doc. No. 95-2] at No. 15.

Lloyd v. Hunt Exploration, Inc., 430 So.2d 298 (LA. App 3rd Cir. 1983) is on point here. There, plaintiffs had granted a mineral lease to Placid Oil Company, which then gave Hunt Oil Company the right to conduct seismic operations on the leased lands. After a seismic company went on the leased property with only the approval of the lessee, the plaintiff sued for damages. The Court of Appeal held as follows:

> A landowner does not abandon his right to protect his interest against wrongful acts of others simply because he has executed a lease of his property. …The plaintiffs had a right of action against the defendant for trespass upon their land and subsequent property damages. (emphasis added.)

Thus, an actionable trespass occurred when the FWS agents and Professor Pechmann entered the Poitevent Lands in March 2011 without permission from the Poitevent Landowners, as the Poitevent Landowners were neither asked for their permission by FWS nor did they grant it, and any permission they obtained from Weyerhaeuser was invalid for their interests in the Poitevent Lands. Moreover, FWS has failed to point out any right Weyerhaeuser may have had to grant permission for the unauthorized entry for the Poitevent Landowners, thus admitting that the entry was conducted without permission of the owner of the property.

Further, during the course of these proceedings, Poitevent Landowners have learned that at least three similar trespasses have occurred upon the property at issue. *See*, DOJ's Response to Poitevent Landowners' Statement of Uncontested Material Facts [R. Doc. No. 90-2] at p. 28, nos.

60 regarding surveys of the area conducted "in the 1990s and 2000s." Another trespass by Professor Pechmann occurred in connection with a report he issued in 2006. *Id*. at no. 61. Like the March 2011 unauthorized entry upon the Poitevent Lands, permission was not granted by, or even requested from, Poitevent Landowners by anyone, including Professor Pechmann or FWS, for any of these surveys.

As damages for trespass, the Louisiana Supreme Court has held that one injured by a trespass is entitled to full indemnification for the damages caused. *Hornsby v. Bayou Jack Logging,* 902 So. 2d 361 (La. 2005). The Poitevent Landowners believe that at this time, and for this court's purposes, invalidation of the Rule is the proper way in which this Court may fully indemnify them for their trespass damages. When the Rule is invalidated or finally validated, after appeal, the Poitevent Landowners will decide on how they will pursue any other trespass damages.

Invalidation of the Rule is an appropriate remedy here as it would both adequately and "fully indemnify" the Poitevent Landowners for the damages caused by the trespass in March 2011 and Louisiana law allows such an approach. *See*, *Givens v. Town of Ruston,* 55 So. 2d 289, 291 (La. Ct. App. 1951).

Should the Court decide not to invalidate the Rule directly due to the trespass, at a minimum, it should invoke the civil equivalent of the "fruit of the poisonous tree" doctrine and exclude evidence obtained during the trespass from being admitted as it was illegally obtained. See, discussion by Justice Felix Frankfurter in *Nardone v. United States,* 308 US 338 (1939). Thus, any portion of the Administrative Record purporting to demonstrate "suitability" of the Poitevent Lands for frog habitat must be excluded from the Administrative Record. In turn, this means that FWS had absolutely no evidence on which to make its decision for Unit 1, thus

making it an abuse of discretion, as well as arbitrary and capricious and in violation of the ESA and the FWS' rule and regulations thereunder.

L. FWS Failed to Prove That All of Unit 1 is Required Frog Habitat.

In the Rule, FWS adjudicates that **all** of Unit 1's 1,544 acres are "essential for the conservation of" the frog.[15] There are, however, no facts in the record for the Rule from which FWS could have drawn a rational connection as to why all of Unit 1 is critical habitat for the frog as its designation assumes the false fact that frogs will someday be on the Poitevent Lands. Thus, FWS has once again failed to use the "best scientific data" for its conclusion and the Rule is therefore invalid for this additional reason.

Although FWS claims to have done this for Unit 1, it could not possibly have done so as it admits that there are no frogs and no habitat on the land. Therefore, to justify its action in the Rule for Unit 1, FWS was forced to "cast a statutory net" over the lands there and conclude that **if** those lands are somehow transformed into suitable habitat for the frogs and **if** frogs are ever moved there, the area they **would then** need is Unit 1, or possibly some portion of Unit 1. But, all this supposition means is that FWS did not use the "best scientific data available" and it cannot justify the extent of its designation as to Unit 1.

FWS also excluded from the Rule at least one other "agricultural area" that also does not contain habitat suitable for the frog, noting that it "does not contain habitat suitable for the " frog. *See* 77 Fed. Reg. 35118. Here, although Unit 1 is a similar "agricultural area" (a **tree farm** managed by Weyerhaeuser[16]) that also does not have habitat suitable for the frog, FWS nevertheless included Unit 1 based on the incorrect conclusion that it is "essential for the

[15]*See* 77 Fed. Reg. 35118-01, 2012 WL 2090270, *28.
[16]*See* Federal Register, Vol. 66, No. 233, page 62995, for an acknowledgment by FWS that Unit 1 is a "pine plantation" similar to any other agricultural venture.

conservation of the species". As FWS failed to exclude the "agricultural area" that is Unit 1 that also does not contain frog habitat similar to the area FWS excluded for this very same reason, the Rule is arbitrary and capricious under the APA.

M. The Dusky Gopher Frog is Not an "Endangered Species" under ESA

The ESA requires that critical habitat only be designated for listed species, that is that such species be put on the "Endangered Species List." Here, the **Mississippi** gopher frog was declared to be an "endangered species" by FWS in 2001. In the Rule, however, FWS designated Unit 1 as critical habitat for a species **not** on the Endangered Species List (the "**Dusky** gopher frog"), and without notice or opportunity for the Poitevent Landowners to be heard, in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2).

The Rule straightforwardly says this:

> Subsequent to the listing of the dusky gopher frog (=Mississippi gopher frog), taxonomic research was completed that indicated that the entity (which we listed as a DPS of the dusky gopher frog (Rana capito [sic] sevosa)) is <u>different from</u> other gopher frogs and warrants <u>acceptance as its own species</u> (Young and Crother 2001, pp. 382-388)…[T]he frog warrants acceptance as its own species.

77 Fed. Reg. 35118. FWS further confirmed that the Mississippi and the Dusky gopher frogs are "different" species by stating in the Rule that: "…the [Dusky gopher frog] has now been accepted by the scientific community as a <u>unique species</u>, Rana sevosa." 77 Fed. Reg. 35118 (emphasis added).

The facts show that consistently throughout these proceedings the only species mentioned was the **Mississippi** gopher frog. Most ironically, the CBD and the FWS admitted this in the CBD's "sue-and-settle" lawsuit in *Friends of Mississippi Public Lands and Center for Biological Diversity v. Kempthorne*, 07-CV-02073 (AR 2421-2433), and the settlement orders agreed to by FWS and CBD, all of which relate **solely** to the **Mississippi** gopher frog. *See* 66 Fed. Reg.

62993 and 76 Fed. Reg. 59774.

By its eleventh hour "bait-and-switch" tactic, FWS made a fatal error as the **Dusky** gopher frog is **not listed** as an "endangered species" under the ESA.

The Poitevent Landowners and all commentators were therefore "baited" into commenting on the **Mississippi** gopher frog. Then, at the last minute, FWS then abruptly, arbitrarily and capriciously "switched" species in the Rule, and substituted a "different…species" (the **Dusky** gopher frog) for the actual endangered species (the **Mississippi** gopher frog). It then proclaimed in the Rule that Unit 1 is required "critical habitat" for the **Dusky** gopher frog.

As the "species" under consideration until the Rule was issued in June, 2012 was the "**Mississippi** gopher frog", **not** the "**Dusky** gopher frog." FWS' last minute "bait-and-switch" on the species violated the ESA, FWS' rules and regulations thereunder and the requirements of the Administrative Procedures Act, not to mention fundamental constitutional principles of due process and fairness. The Rule is therefore invalid.[17]

N. Unit 1 Was "Lost Historical Range" and Cannot Be Critical Habitat

The ESA protects species identified as either "endangered" or "threatened." A species like the frog is "endangered" if it "is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6) (emphasis added).

On December 9, 2011, FWS and the National Marine Fisheries jointly defined the phrase "significant portion of its range" for purposes of an ESA listing. *See* 76 Fed. Reg. 76987 (Dec. 9, 2011) (the "Range Rule"). The Range Rule defines "range" as the general geographical area

[17] For additional extensive discussion of the points in this Memorandum, *see* 60-Day Notice (Ex. "H" to Poitevent Landowners' Memorandum in Support of their Motion for Summary Judgment [R. Doc. No. 80-1]) and comments of counsel for the Poitevent Landowners dated November 23, 2011 and February 28, 2012 (Exhs. "F" and "G" to Poitevent Landowners' Memorandum in Support of their Motion for Summary Judgment [R. Doc. No. 80-1]) and comments of Weyerhaeuser, all of which are contained in the Record.

within which the species is found at the time the listing decision is made. It then **excludes** from this definition "lost historical range," stating as follows:

> We conclude that… lost historical range cannot be a significant portion of the range.…Thus, ‘‘range’’ must mean ‘‘current range,’’ not ‘‘historical range. ‘.. [18] (emphasis added.)

Thus, to be valid for Unit 1, the Rule can only apply to the general geographic area in which the frog was found **at the time the listing decision for it was made in 2001**.[19] Here, at the time of its listing in 2001, FWS concluded that Unit 1 was **not** occupied by the frog, *See* 66 Fed Reg. 62994, 62995 (emphasis added). Therefore, applying FWS's own conclusions, as well as common sense and logic, Unit 1 was "lost historical range" for the frog and the Rule improperly designates Unit 1 as its Critical Habitat. The Poitevent Landowner's reading of this provision is reasonable and thus the Court should reject the Defendants' strained and unreasonable reading of it as arbitrary and capricious.

O. FWS Failed to Prove That All of Unit 1 is Required Frog Habitat

In the Rule, FWS adjudicates that **all** of Unit 1's 1,544 acres are "essential for the conservation of" the frog.[20] There are, however, **no facts** in the record from which FWS could have rationally concluded that all of Unit 1 is critical habitat for the frog because the only way it can become such habitat is if FWS' vain "hope" that frogs will someday occupy the Poitevent Lands. FWS admits that there are no frogs and no habitat on the land, so it was then forced to "cast a statutory net" over the lands there and concluded that **if** these lands are somehow transformed into suitable habitat for the frogs, and **if** frogs are ever moved there, the area they would **then** need is Unit 1. As this conclusion is incompatible with Poitevent Landowners'

[18]*See* Federal Register, Vol. 76, No. 237, Friday, December 9, 2011, pages 76996 and 76997.
[19]The FWS agrees: " Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed." *See* 77 FR 35118-01; 2012 WL 2090270 *10; *See also* 76 Fed. Reg. 59783.
[20]*See* 77 Fed. Reg. 35118-01, 2012 WL 2090270, *28.

current use of the property and is based on pure speculation, it cannot possibly be based upon or supported by the "best scientific data" available and the Rule is fatally flawed, and arbitrary and capricious.

FWS also excluded from the Rule at least one other "agricultural area" as it "does not contain habitat suitable for the " frog. *See* 77 Fed. Reg. 35118. Here, although Unit 1 is an "agricultural area" (a **tree farm** managed by Weyerhaeuser[21]) that also does not have "habitat suitable for the frog" (no PCEs), FWS nevertheless included the Unit 1 "agricultural area" in the Rule. Thus, the Rule is arbitrary and capricious under the APA.

P. The Poitevent Landowners Declaration is Valid

In the Eastern District of Louisiana "[a]s a general rule, a party's attorney should not be called as a witness unless his testimony is both necessary and unobtainable from other sources." *Matter of Cropwell Leasing*, CIV. A. 92-637, 1996 WL 592747 (E.D. La. Oct. 15, 1996). This rule and the authorities cited by Defendants are appropriately applied only when an attorney seeks to testify as to some fact or event of which he has become aware during the course of his representation of his client in litigation.

The situation before this Court is decidedly different. The affiant of the Poitevent Declaration, Edward B. Poitevent, II, is a both a member and the Manager of one of the plaintiffs, P&F Lumber Company (2000), L.L.C, and a co-owner of the Poitevent Lands along with St. Tammany Land Co., L.L.C., PF Monroe Properties, L.L.C. and Markle Interests, L.L.C. All of the co-owners are identically situated from a common factual standpoint. [22]

[21] *See* Federal Register, Vol. 66, No. 233, page 62995, for an acknowledgment by FWS that Unit 1 is a "pine plantation" similar to any other agricultural venture.

[22] DOJ and CBD admit that the Poitevent Landowners and Markle Interests, L.L.C. are co-owners of the Poitevent Lands. *See*, DOJ's Response to Poitevent Landowners' Statement of Uncontested Material Facts [R. Doc. No. 90-2] at No. 3 and CBD's Response to Poitevent Landowners' Statement of Uncontested Material Facts [R. Doc. No. 95-2] at No. 3.

As the contents of Mr. Poitevent's Declaration were not gleaned merely through his representation of personally unrelated clients, but rather in his capacity as the manager of P&F Lumber Company, all of his declarations are based on first-hand, personal knowledge common to all of the Poitevent Landowners, and are therefore admissible under Federal Rule of Evidence 602. *See,* paragraph 1 of the Poitevent Declaration, ("I have personal knowledge of all facts and circumstances in this Declaration."); paragraph 2 ("I am the manager of P&F Lumber Company (2000), L.L.C., one of the Plaintiffs in the captioned matter…"); paragraph 3 (on co-ownership of the Poitevent Lands); and paragraph 4 (on FWS' initial contact of him in May 2011).

Finally, FWS and CBD have waived this objection as no objections by them or anyone acting on their behalf were made at the time for any of the extensive comments made by Mr. Poitevent on behalf of all of the Poitevent Landowners prior to issuance of the Rule or during his testimony at the public hearing on the proposed Rule, or the 60-day Poitevent Letter addressed in the DOJ's and CBD's Motions to Strike.[23] FWS and CBD have thus waived their objection.

CONCLUSION

So that the Poitevent Lands might someday, somehow contain suitable habitat to support frogs and the PCEs they require to survive there, and thus fulfill the FWS' vain "hope", FWS must (i) take control of the lands, (ii) spend an enormous amount of taxpayer money to somehow convert all 1,544 acres into suitable "critical habitat" for the frogs, (iii) move what is certain to become a plague of frogs into their new home and then (iv) "hope" that the frogs survive there. But none of this will **ever** happen, and there will **never** be **any frogs** on the Poitevent Lands as they will not allow it and (as FWS and CBD admit) FWS has **no legal power or right** to force them to do so. FWS knew this before it issued the Rule. Yet, it blindly ignored this disturbingly

[23] FWS' Motion to Strike details the numerous record citations for this at footnote 5, page 7.

"inconvenient truth" and issued the Rule with the Poitevent Lands included as critical habitat.

If this Court does not reverse the Rule, what will the FWS have accomplished? **Absolutely nothing for the frogs**. Unit 1 will never be suitable habitat for frogs as the Poitevent Landowners intent to continue to use the land as an agricultural tree farm. No frogs will ever inhabit the Poitevent Lands. But, FWS will have accomplished one thing! It will have successfully, without benefit to the species, removed the Poitevent Lands from commerce. Surely, this type of ridiculous "unintended consequence" does not fall within Congress' intent in enacting the ESA and is not within FWS' power to do. Yet, if the Rule stands, this is what will happen.

The Court must seriously consider the vast, sweeping, long-term potential for great harm to private property rights that allowing the Rule to stand will have. If it does, no land anywhere will be safe from the FWS' grasp as there will then be no limits on the amount or location of private land that it can trespass on, and then set aside, as “potential critical habitat” based on a speculative “hope” that it might someday, somehow actually become real habitat for some animal or plant species. Simply put, the FWS' Final Rule is an abuse of discretion and is both arbitrary and capricious.

Accordingly, the critical habitat designation in the Rule should be invalidated as to Unit 1 and the Rule should be revised to exclude Unit 1, and this Court should deny the FWS' and CBD's respective Motions for Summary Judgment and grant the Poitevent Landowners' Motion for Summary Judgment.

Respectfully submitted,

BAKER DONELSON BEARMAN CALDWELL & BERKOWITZ, PC

By: s/Edward B. Poitevent, II
EDWARD B. POITEVENT, II (#10564)
BRIAN M. BALLAY (#29077)
KATHLYN G. PEREZ (#30668)
201 St. Charles Avenue, Suite 3600
New Orleans, Louisiana 70170
Telephone: (504) 566-5200
Facsimile: (504) 636-4000

ATTORNEYS FOR P&F LUMBER COMPANY (2000), L.L.C., ST. TAMMANY LAND CO, L.L.C. AND PF MONROE PROPERTIES, L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2014, a copy of the foregoing was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all counsel of record by operation of the Court's electronic filing system.

s/Edward B. Poitevent, II